

Supreme Court, U.S.

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No. 78-1939

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOSEPH S. COLOGNINO, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE SECOND CIRCUIT*

MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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Petitioner contends that hearsay statements of a co-conspirator were improperly admitted into evidence subject to connection and that the government deliberately dismissed charges against a co-defendant after the jury had been selected so as to deprive petitioner of his right to exercise his peremptory challenges.

After a jury trial in the United States District Court for the Western District of New York, petitioner was convicted on one count of conspiracy to distribute a controlled substance (21 U.S.C. 846) and three counts of aiding and abetting the sale of controlled substances (21 U.S.C. 841(a)(1) and 18 U.S.C. 2). He was sentenced to five years' imprisonment, to be followed by a two-year special parole term. The court of appeals affirmed in a memorandum opinion (Pet. App. A1-A2).

The evidence at trial, which is not disputed here, showed that petitioner was a supplier of phencyclidine hydrochloride (PCP). DEA Agent Iwinski, acting in an undercover capacity, purchased PCP on three occasions between January and March 1978 from petitioner's co-defendant, Hiawatha Jackson.¹ Jackson testified in detail that petitioner provided the PCP for each sale, arranged the meeting place, and kept most of the proceeds from the sales. Although Agent Iwinski never met petitioner, surveillance teams saw petitioner drive Jackson to the rendezvous point for the first sale and then meet with him immediately after the sale was completed (Tr. 622-653). Petitioner was also close by during the second sale and again met Jackson after the deal was completed (Tr. 637-642). Finally, on the third sale, petitioner parked his car a short distance from Jackson and Agent Iwinski, and when agents moved in to arrest Jackson, petitioner fled the area and was apprehended after a high-speed chase (Tr. 699-704, 708-710, 753-758).

1. Petitioner contends (Pet. 9-14) that it was procedurally improper to admit hearsay testimony about co-conspirator Jackson's statements "subject to" later proof of a conspiracy between petitioner and Jackson. Significantly, however, petitioner does not argue that no conspiracy was proved. Indeed, he cannot, for Jackson

¹Prior to trial, Jackson pleaded guilty to one count of distributing a controlled substance, in violation of 21 U.S.C. 841(a)(1). He then testified for the government at petitioner's trial and was subsequently sentenced to four years' probation.

The indictment against another co-defendant, Melvin Brown, was dismissed prior to trial. Jackson testified, and Brown confirmed that the latter only used his car to drive Jackson to the second and third sales with Iwinski but knew nothing about the transactions (Tr. 392-395, 402-403, 407-408, 414).

himself testified about his dealings with petitioner—that the latter provided the PCP for each of the sales and arranged the locations for the meetings with Agent Iwinski; that petitioner drove Jackson to the first rendezvous and immediately afterwards received the money from Jackson (Tr. 369-386); that petitioner drove to the second meeting site, gave the PCP to Jackson, and again waited for the money (Tr. 390-392, 397-402); and that petitioner met with Jackson immediately prior to the third sale to tell him where the PCP was located (Tr. 405-407, 410-412). Petitioner's claim thus reduces itself to a complaint about the order of proof at trial, a matter left to the wide discretion of the trial court.² *United States v. Lyles*, 593 F. 2d 182, 194 (2d Cir.), cert. denied, No. 78-1332 (March 26, 1979); *United States v. Ziegler*, 583 F. 2d 77, 80 (2d Cir. 1978); *United States v. Macklin*, 573 F. 2d 1046, 1049 n.3 (8th Cir.), cert. denied, No. 77-6895 (October 2, 1978). In any event, Agent Iwinski's testimony about Jackson's statements to him was clearly harmless, for Jackson testified about the same events, and petitioner's counsel availed himself of the opportunity to cross-examine this witness. See *Nelson v. O'Neil*, 402 U.S. 622 (1971).

2. Petitioner also claims (Pet. 15-19) that the dismissal of the indictment against co-defendant Brown after the jury was selected was deliberately done to deprive petitioner of the opportunity to select an impartial jury. This claim is without merit.

The jury for petitioner's trial was selected on October 10, 1978, but the trial date itself was postponed to

²Moreover, the trial court instructed the jury during Iwinski's testimony that Jackson's statements were not to be considered against petitioner until the jury determined beyond a reasonable doubt that a conspiracy existed between Jackson and petitioner (Tr. 118-119).

November 6th. In the intervening period, a new prosecutor took over the case and interviewed co-defendant Jackson, who had already pleaded guilty. These interviews occurred shortly before the trial was to take place; it was on these occasions that the prosecutor learned for the first time that Jackson would exonerate Brown (see C.A. App. 82; Tr. 306).³ The government then moved to dismiss the indictment against Brown. This was done immediately before the beginning of petitioner's trial, and the trial court promptly instructed the jury that the dismissal as to Brown "is not to influence your judgment one way or the other about the evidence as far as [petitioner] is concerned" (Tr. 104-105). While it would have been preferable to have accomplished Brown's dismissal before jury selection took place, petitioner has made no showing that the dismissal was timed intentionally so as to interfere with his right to utilize his peremptory challenges, and both courts below found to the contrary (see Pet. App. A2). Petitioner recognizes that the prosecution is vested with discretion as to whether to prosecute and when to dismiss (see *Bordenkircher v. Hayes*, 434 U.S. 357 (1978); *United States v. Cowan*, 524 F. 2d 504 (5th Cir. 1975), cert. denied *sub nom. Woodruff v. United States*, 425 U.S. 971 (1976); *United States v. Cox*, 342 F. 2d 167 (5th Cir.) (en banc), cert. denied *sub nom. Cox v. Hauberg*, 381 U.S. 935 (1965)), and there is no indication that this discretion was in any way abused here.⁴

³"C.A. App." refers to the appendix filed by petitioner in the court of appeals.

⁴Nor can petitioner gain any support from *Rogers v. United States*, 304 F. 2d 520, 523 (5th Cir. 1962), on which he relies (Pet. 17). First, in *Rogers* "a motion for a mistrial was made and the basis for the court of appeals' decision was that the defendants should not have

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General

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been joined in the first place." *United States v. McCambridge*, 551 F. 2d 865, 872 (1st Cir. 1977). Here, petitioner does not contend that he was entitled to a severance before the guilty plea. Second, here the district court instructed the jury not to draw any conclusions about petitioner from the dismissal of his co-defendant. In *Rogers* no such instruction appears to have been given. See *id.* at 872. Nor is this case like *United States v. Rispo*, 460 F. 2d 965, 973 (3d Cir. 1972), also relied on by petitioner (Pet. 18), for there is no indication that the indictment was brought against Brown in anything but good faith.